(3)

Supreme Court, U.S.
FILED
MAR 23 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1339

In The
Supreme Court Of The United States

OCTOBER TERM, 1989

FRANK ACKLEY d/b/a
VILLAGE SQUARE CHEVRON, ET AL.,
Petitioners,

v.

GULF OIL CORPORATION, CHEVRON USA, INC.
and CUMBERLAND FARMS, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT CUMBERLAND FARMS, INC. IN OPPOSITION TO THE PETITION

Of Counsel and On The Brief:

MARK G. HOWARD
Associate General Counsel
Cumberland Farms, Inc.
777 Dedham Street
Canton, Massachusetts 02021
(617) 828-4900

PAUL D. SANSON
MARK P. ANDERSON
SHIPMAN & GOODWIN
799 Main Street
Hartford, Connecticut 06103
(203) 549-4770
Attorneys for Respondent Cumberland Farms, Inc.

PAUL D. SANSON
Attorney of Record

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
COUNTERSTATEMENT OF THE CASE	3
ARGUMENT	8
CONCLUSION	19

TABLE OF AUTHORITIES

CASES — Page

Ackley, et al. v. Gulf Oil Corp., et al., 889 F.2d 1280 (2d Cir. 1989) 12, 13, 14, 15

Aldrich v. Amoco Oil Company, 2 Bus. Fran. Guide (CCH) ¶8322 (S.D. Iowa 1985) 15

Barnes v. Gulf Oil Corp., 795 F.2d 358 (4th Cir. 1986) 12

Burns Brothers, Inc. v. RMT Properties, Inc. 2 Bus. Fran. Guide (CCH) ¶8468 (D. Ore. 1985) aff'd 805 F.2d 1039 (9th Cir. 1986) 15

Cedar Brook Service Station, Inc., et al. v. Chevron U.S.A., Inc., et al., CV-86-4240 (E.D.N.Y. June 5, 1989) 13, 14, 15

Chestnut Hill Gulf, Inc., et al. v. Cumberland Farms, Inc., et al., Docket No. 86-3519-MC (D. Mass. 1988) 13

Florham Park Chevron, Inc., et al. v. Chevron, U.S.A., Inc., et al., 2 Bus. Fran. Guide (CCH) ¶9011 (D.N.J. 1987) 13, 15

Fresher v. Shell Oil Company, 846 F.2d 45 (9th Cir. 1988) 12

May-Som Gulf Inc. v. Chevron U.S.A., et al., 869 F.2d 917 (6th Cir. 1989) 12, 13, 14, 15

McGee v. Gulf Oil Corp.,
2 Bus. Fran. Guide (CCH) ¶8379
(N.D. Ala. 1985) 15

Muha v. United Oil Co., 180 Conn.
720 (1980) 18

Smith, et al. v. Cumberland
Farms, Inc., et al., C.A. 87-1051
(W.D. Pa. Aug. 15, 1988) 13, 14

STATUTES

Connecticut Petroleum Franchise Act
C.G.S. 42-133j et seq. ("CPFA") 5, 6, 8, 19

15 U.S.C. §2801 et seq., the
Petroleum Marketing Practices Act
("PMPA") 4, 5, 6, 7, 8, 9, 10, 17

OTHER AUTHORITIES

13 Moore's Federal Practice ¶817.21 . . . 16

Harlan, Manning the Dikes
13 Record N.Y.C.B.A
541, 552 (1958) 16

Supreme Court Rule 10.1 9

Supreme Court Rule 12.5 . . . . . 2, 3

No. 89-1339

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1989

FRANK ACKLEY d/b/a VILLAGE
SQUARE CHEVRON, ET AL.,
Petitioners,

v.

GULF OIL CORPORATION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT CUMBERLAND FARMS,
INC. IN OPPOSITION TO THE PETITION

I. INTRODUCTION

Cumberland Farms, Inc. ("Cumberland")[1/] is submitting this brief in opposition

1/ There are no parent companies or subsidiaries (except wholly owned subsidiaries) of Cumberland.

to the petition for a Writ of Certiorari. In their petition, the petitioners set forth issues in their "Questions Presented for Review" which either have been mischaracterized or are not appropriate questions for review. In addition, the petitioners inaccurately describe the facts and prior case history in their "Statement of the Case," and devote most of their 59-page petition to arguing their case for a third time rather than presenting to this Court, with "accuracy, brevity and clearness," an understanding of the points requiring consideration. See Supreme Court Rule 12.5.[2/] Accordingly, Cumberland

---

2/ Supreme Court Rule 12.5 provides:

> The failure of a petitioner to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding

will present a short Counterstatement of the Case and will then briefly discuss each of the five "Questions Presented" and why they fail to set forth an adequate basis for the granting of the petition.

II. COUNTERSTATEMENT OF THE CASE

The three actions which are the subject of this petition were filed by the petitioners in the United States District Court for the District of Connecticut and were subsequently consolidated. The first action was filed on August 15, 1986 ("Ackley I"), the second action was filed on May 22, 1987 ("Ackley II"), and the third action was filed on October 26, 1987 ("R.A.C. Car Service").

(CONTINUED)

> of the points requiring consideration will be a sufficient reason for denying his petition. (Emphasis added).

On this basis alone, the petition should be denied.

The allegations in these consolidated cases relate to two general events. In Ackley I, the petitioners challenged the transfer of their franchises on May 31, 1986 from the respondent Chevron U.S.A. Inc. ("Chevron")[3/] to respondent Cumberland Farms, Inc. ("Cumberland"). This transfer occurred as part of Chevron's sale to Cumberland of all its marketing assets in the northeast (the "Chevron Transaction"). The petitioners alleged that there was neither a valid assignment of their franchises by Chevron to Cumberland nor a valid market withdrawal by Chevron under 15 U.S.C. §2801 et seq., the Petroleum Marketing Practices Act ("PMPA"). In Ackley II and R.A.C. Car

---

3/ The Gulf Oil Corporation, which was acquired by Chevron in 1984, was also named as a defendant in these three cases and is a respondent in this petition.

Service, the petitioners challenged the new dealer agreements offered by Cumberland and, in particular, whether the new rents contained in those agreements violated the PMPA. The petitioners further claimed that they were franchisees under the Connecticut Petroleum Franchise Act C.G.S. §§42-133j et seq. ("CPFA") and that Cumberland failed to comply with the CPFA.

On September 30, 1988 the petitioners and respondents filed cross motions for summary judgment on all claims presented. The respondents moved for summary judgment in Ackley I on all counts claiming that judgment should be granted in their favor because: (a) the PMPA did not apply since no termination or nonrenewal of the petitioners' franchises occurred, but rather a valid assignment was accomplished; or (b) alternatively, the PMPA requirements

for a valid market withdrawal were satisfied.

In Ackley II and R.A.C. Car Service the respondents moved for summary judgment on all counts on the basis that either: (a) the petitioners were not franchisees within the meaning of the CPFA; or (b) Cumberland's proposed franchise agreements did not violate either the PMPA or the CPFA.

The district court held extended oral argument and on May 5, 1989 issued a 43-page opinion granting the respondents' motions for summary judgment. With respect to the issues raised in Ackley I, the court held that the PMPA was not applicable to the Chevron Transaction because the petitioners had failed to show that there had been either a "termination" or "nonrenewal" of their franchises, a prerequisite to any cause of action under

the PMPA. See Ruling on Cross Motions for Summary Judgment ("District Court Ruling"), reprinted in Petitioners' Appendix ("Pet. App.") at 41(a). Because the district court held that the PMPA was not invoked by the lawful assignment of Chevron's franchises to Cumberland, it did not rule on the respondents' alternative summary judgment claim that a valid market withdrawal was effectuated. Id. Having decided that there was a valid assignment by Chevron, the court also considered whether there was a proper renewal of the petitioners' franchises at the end of the assignment period and determined that there was. Id. at 57(a) - 63(a).

With respect to the issues raised in Ackley II and R.A.C. Car Service, the district court held that Cumberland offered the petitioners new franchises in good faith and in the normal course of its

business, and that the petitioners were not franchisees under the CPFA. Id. at 62(a) - 63(a). The court further granted summary judgment in all three cases on the CUTPA claims because they were based on the same allegations contained in the claims under the PMPA and the CPFA.

On November 27, 1989, the Second Circuit Court of Appeals affirmed the "comprehensive and well reasoned opinion" of the Chief Judge of the district court, granting the respondents' motions for summary judgment. It is from that ruling that the petitioners seek this Court's review.

III. ARGUMENT

The petitioners claim there are five questions which are presented for review. A cursory review of these questions reveals that only one of them -- the second one

which incorrectly suggests there is a conflict among the circuits -- even arguably presents the "special and important reasons" necessary for review.[4/] This second question, however, as presented in the petition, is grossly misleading and there is, in fact, no conflict among the circuits.

The first question proposed by the petitioners is whether a franchisor's delegation of franchise rights and obligations results in a nonrenewal or termination of a franchise relationship under the PMPA. The PMPA explicitly states, however, that this question is not

---

4/ Rule 10.1 of this Court expressly states that a petition "will be granted only when there are special and important reasons therefor." While this rule is not intended to be exhaustive, the five questions put forth by the petitioners do not in any way raise the kind of issues provided as examples in that Rule.

one to be decided under the PMPA but rather to be decided under state law. As the petitioners concede, §2806(b) of the PMPA expressly provides that transfers or assignments are neither authorized nor prohibited by the PMPA but instead are "to be determined by reference to applicable state law." Pet. Br. at 27 (emphasis in original). Thus, neither the PMPA nor any federal statute is even at issue with respect to this question.

In addition, the district court's ruling on this issue was based on the specific facts relating to this particular transfer from Chevron to Cumberland. Contrary to the claim by petitioners that the issues in this case are of "critical importance" to hundreds of thousands of franchisees or even approximately 90,000 petroleum franchises (Pet. Br. at 5), the rulings by the courts below are restricted

by the specific facts and circumstances of these cases -- which at a minimum are limited to assignments of petroleum franchises -- and do not have broad applicability.

The court, after considering hundreds of pages of affidavits, deposition excerpts, and other exhibits, found that with respect to the three critical elements of a petroleum franchise relationship there had been no material change in the benefits or burdens to the petitioners. This finding was necessarily based on the application of the particular facts of this transaction and is simply not the kind of ruling appropriate for Supreme Court review.

The second question set forth by the petitioners is the claim that there are "substantially conflicting decisions of numerous Federal District and Appellate Courts regarding question number 1 above"

which require "resolution by this Court." Pet. Br. at i. This claim is at best misleading. There have been four decisions by courts of appeals which address the general issue of whether an assignment of a franchise constitutes a nonrenewal or termination. All four have held that there is no nonrenewal or termination if the assignment complies with the applicable state law. See Ackley, et al. v. Gulf Oil Corp., et al., 889 F.2d 1280 (2d Cir. 1989); May-Som Gulf Inc. v. Chevron U.S.A., et al., 869 F.2d 917 (6th Cir. 1989); Fresher v. Shell Oil Company, 846 F.2d 45 (9th Cir. 1988); Barnes v. Gulf Oil Corp., 795 F.2d 358 (4th Cir. 1986). It should be noted that May-Som is a case based on virtually the same transaction as the one in Ackley. With respect to the specific facts of the two cases, the appellate courts affirmed the district courts'

rulings that the assignments were valid under state law.

It has been at the district court level that there have been inconsistencies. In addition to the Ackley and May-Som cases, there have been lawsuits brought by dealers in Massachusetts, New York, New Jersey and Pennsylvania challenging the Chevron Transaction. See Cedar Brook Service Station, Inc., et al. v. Chevron U.S.A., Inc., et al., CV-86-4240 (E.D.N.Y. June 5, 1989); Chestnut Hill Gulf, Inc., et al. v. Cumberland Farms, Inc., et al., Docket No. 86-3519-MC (D. Mass. 1988), Memorandum and Order, October 13, 1988; Smith, et al. v. Cumberland Farms, Inc., et al., C.A. 87-1051 (W.D. Pa. August 15, 1988); Florham Park Chevron, Inc., et al. v. Chevron, U.S.A., Inc., et al., 2 Bus. Fran. Guide (CCH) ¶9011 (D.N.J. 1987). The courts in these actions have ruled that even if the

assignment was valid under state law, Chevron and Cumberland must demonstrate that there was a valid market withdrawal under the PMPA. All but the Cedar Brook decision, however, were handed down prior to the Sixth Circuit's opinion in May-Som and all of them, including Cedar Brook, preceded the Second Circuit's ruling in Ackley.[5/] Moreover, in Smith, the

---

5/ In a bizarre twist of logic, petitioners argue that "the Second Circuit's affirmation of the Connecticut District Court's opinion in this regard therefore would apparently also be in direct conflict with the Opinion of its own Eastern District in Cedar Brook, supra." Pet. Br. at 44 - 45. An appellate ruling can never be in conflict with a district court decision -- higher court rulings reverse inconsistent lower court decisions. Since Cedar Brook was decided prior to the affirmance in Ackley, it would appear that an appeal on this issue would lead to a reversal. Not suprisingly, the defendants in Cedar Brook have already moved in the district court for reconsideration of its decision on this issue in light of Ackley.

Pennsylvania district court granted summary judgment for the defendants on the alternative ground of a valid market withdrawal, so no appeal was taken on the assignment ruling.

The other three cases are still pending and in both Cedar Brook and Florham Park the defendants have moved for reconsideration of the earlier summary judgment rulings.[6/] If, and only if, the rulings by the district courts are not modified based on May-Som and Ackley and are affirmed on an appeal, will there be a conflict among the circuits. As of

---

6/ Other district court decisions have held that valid assignments of franchises do not trigger the PMPA. Burns Brothers, Inc. v. RMT Properties, Inc., 2 Bus. Fran. Guide (CCH) ¶8468 (D. Ore. 1985) aff'd 805 F.2d 1039 (9th Cir. 1986); Aldrich v. Amoco Oil Company, 2 Bus. Fran. Guide (CCH) ¶8322 (S.D. Iowa 1985); McGee v. Gulf Oil Corp., 2 Bus. Fran. Guide (CCH) ¶8379 (N.D. Ala. 1985).

now, there is only uniformity among the circuits and any suggestion to the contrary is simply inaccurate.7/

The third question put forth by the petitioners as warranting review is whether Chevron's delegation of its obligations under the franchise agreements was

---

7/ Absent such a conflict, a disagreement between a decision of a district court and that of various courts of appeals is not a sufficient ground to grant the petitioners' writ. As was stated by former Supreme Court Justice Harlan:

> Generally speaking, nothing short of a difference of decision between two courts of appeals, or between a court of appeals and the court of claims, whose judgments are reviewable directly by the Supreme Court, will suffice to satisfy the conflict rule. A conflict of decision between two district courts is not a ground for certiorari, since resolution of such conflict is a matter resting with the courts of appeals. . . .

See 13 Moore's Federal Practice ¶817.21 citing Harlan, Manning the Dikes 13 Record N.Y.C.B.A. 541, 552 (1958).

permissible. This is the same question, in effect, that is being asked in the petitioners' first question. The question is one that arises under state law and one whose answer necessarily depends upon the particular facts of each assignment. Petitioners also argue that the assignment resulted in the loss of their "explicit and intended remedial statutory rights and protections." Pet. Br. at i - ii. This claim also concerns solely state statutory rights and does not implicate any federal questions.

The fourth claimed question for review is whether a valid petroleum market withdrawal has occurred. Seeking review on this question borders on the frivolous because neither the district court nor the appellate court ruled on this issue, having already determined that the assignment was valid and did not trigger the PMPA. Quite

simply, there is no decision from the courts below for this Court to review.

The fifth question seeks review of how the district court interpreted and applied the CPFA, a state statute. First of all, the petitioners' representation that the "Courts below have ignored the legislatively intended specific inclusionary language in the statute" [sic] (Pet. Br. at 57) is false. The district court directly addressed this claim (District Court Ruling, Pet. App. at 52(a) - 54(a)) and disagreed with the petitioners' argument. Secondly, the petitioners' suggestion that the decision by the district court is inconsistent with the decision by the Connecticut Supreme Court in Muha v. United Oil Co., 180 Conn. 720 (1980) is also incorrect. The Connecticut Supreme Court did state that the amendment in question was intended to

include other types of relationships as possible franchises. The Court also made it abundantly clear that whatever the relationship was, there was still no franchise within the meaning of the CPFA unless the supplier had prescribed a marketing plan or system. Finally, this question obviously relates to the application of a state statute to the specific facts of this case, and is not the kind of issue appropriate for Supreme Court review.

IV. CONCLUSION

For the foregoing reasons, Cumberland respectfully requests that the petition be denied in all respects.

RESPONDENT,
CUMBERLAND FARMS, INC.

By
PAUL D. SANSON
MARK P. ANDERSON
Shipman & Goodwin
799 Main Street
Hartford, CT 06103-2377
(203) 549-4770

PAUL D. SANSON
Attorney of Record

Of Counsel and on the Brief:

MARK G. HOWARD
Associate General Counsel
Cumberland Farms, Inc.
777 Dedham Street
Canton, MA 02021
(617) 828-4900

Dated March 23, 1990